

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3 David Levoyd Reed,

4 Plaintiff

5 v.

6 James Dzurenda et al.,

7 Defendants

Case No.: 2:19-cv-00326-JAD-BNW

**Order Granting in Part Motion for
Summary Judgment, Overruling
Objection, and to Directing Plaintiff to
Show Cause Why Unserved Defendants
Should Not Be Dismissed**

[ECF Nos. 63, 65, 115]

9 Pro se plaintiff David Reed sues several correctional officers under 42 U.S.C. § 1983,
10 claiming that an altercation at the High Desert State Prison left him with several staples in his
11 head and a disciplinary charge for battery. Six of those officers move for summary judgment on
12 Reed's claims, arguing that various immunities and procedural bars prohibit his recovery. They
13 add that no genuine dispute exists about his excessive-force claim because several officers were
14 not involved in the fight and those that were did not use excessive force. Reed disagrees and
15 provides declarations of other inmates and from himself to support his version of the story.

16 I grant the defendants' motion in part. I find that Reed has not presented any evidence to
17 support his failure-to-protect claim against officer Henry Grant and that officer Guy Brown and
18 Lieutenant Patrick Moreda relied on sufficient evidence to ensure Reed's due-process rights in
19 his disciplinary hearing. But while the parties agree on much, what they disagree on precludes
20 summary judgment on Reed's remaining claims. I also overrule Reed's objection to the
21 magistrate judge's recent order denying his sanctions motions because he has not presented a
22 valid objection. Given that two defendants remain unserved in this matter, I then order Reed to
23 show cause by September 27, 2021, why the claims against them should not be dismissed

1 without prejudice for his failure to serve them. Finally, I refer this matter to the pro bono
 2 program to attempt to find counsel for this case. And I order Reed and the remaining defendants
 3 to a settlement conference with the magistrate judge.

4 **Background**

5 **I. Factual background**

6 A few winters ago, correctional officer Brandon Stubbs was looking into some
 7 allegations that Reed was a member of a gang and had received a couple tattoos while
 8 incarcerated in violation of the prison's policy.¹ So the day after Christmas, Stubbs ordered
 9 Reed to speak with him in an office about the allegations.² Reed denied the allegations, but
 10 Stubbs persisted and required Reed to remove his shirt so that Stubbs could search for the gang
 11 tattoos.³ When Stubbs found two permanent markings that he believed confirmed his suspicions,
 12 he put Reed in a secure spot so that he and officers Corral-Lagarda and Karsky could search
 13 Reed's cell.⁴ That search turned up a couple letters addressed to Reed that used phrases that the
 14 officers attributed to the gang.⁵ This much the parties largely agree on. But according to Reed,
 15 that's not all they found, and what happened next is hotly disputed.

20 ¹ ECF No. 64 at 8; *see* ECF No. 92 at 4, ¶ 16 (Reed's declaration). Citations to Reed's response,
 21 ECF No. 92, that include a paragraph citation refer to Reed's declaration that is attached to his
 response.

22 ² ECF Nos. 64 at 8; 92 at 4, ¶ 16.

23 ³ ECF Nos. 64 at 8; 92 at 5, ¶ 16.

⁴ ECF No. 64 at 8.

⁵ *Id.*; ECF No. 92 at 5, ¶ 16.

A. The officers' version

According to the officers, they brought Reed back to the office so that they could take pictures of the tattoos that Stubbs had just found.⁶ But Reed refused, started shouting at them, and let them know that he was ready to fight.⁷ Eventually they'd had enough and Karsky ordered Reed to put his hands on the wall so that he could handcuff him.⁸ Stubbs grabbed Reed so that they could restrain him, but as Reed began to turn around, he acquiesced and said that he would comply with their requests.⁹ But that was a lie, and as soon as Stubbs let Reed go, Reed elbowed Karsky in the stomach and began to swing at the officers.¹⁰ Fearing that Reed would strike the officers and escape, Corral-Lagarda grabbed Reed by the shirt and put him on the ground where Reed continued to fight.¹¹ Soon another officer arrived, and they were able to shackle Reed.¹² After the fight had deescalated, officers Aaron Dicus and Grant came to help the other officers restrain Reed—Dicus with his hand on Reed's head and Grant holding down Reed's upper body.¹³

At some point, Moreda arrived, and later that day he wrote Reed up for battery and notified him of the charge.¹⁴ On New Year's Day, Reed pled not guilty to the battery charge at

⁶ ECF No. 64 at 8.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 8–9.

¹⁰ *Id.* at 9.

¹¹ *Id.* at 11.

¹² *Id.*

¹³ *Id.* at 5, 11.

¹⁴ *Id.* at 6.

1 his first disciplinary hearing.¹⁵ During his formal hearing in front of Brown weeks later, Reed
 2 testified in his own defense.¹⁶ But Reed’s testimony was insufficient to overcome officer
 3 Karsky’s report, and Brown found Reed guilty of battery and sentenced him to nearly 200 days
 4 in disciplinary segregation.¹⁷

5 **B. Reed’s version of events**

6 Reed tells a vastly different story. He claims that when the officers returned from their
 7 search, they flaunted a grievance report that Reed had filed against one of their peers for an
 8 incident earlier in the month.¹⁸ They called Reed a snitch and demanded that he sign a form
 9 labeling himself as a gang member.¹⁹ But Reed contends that he hasn’t been affiliated with the
 10 gang in years and sought to explain the language within the letters as mere slang.²⁰

11 When Reed refused to do as he was told, Karsky’s patience grew thin.²¹ Karsky ordered
 12 Reed to put his hands on the wall so Karsky could handcuff him and take him back to his cell.²²
 13 Reed did so, but Karsky flung Reed’s head into the wall and provoked him to fight, which
 14 “encouraged [Reed] to tell Karsky to do something.”²³ Chaos ensued as Karsky and Stubbs
 15 began to pummel Reed—hitting him with a stick, punching, kicking, and stomping on him as he
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18 ¹⁵ *Id.* at 21.

19 ¹⁶ *Id.* at 23.

20 ¹⁷ *Id.* at 23–25.

21 ¹⁸ ECF No. 92 at 5, ¶ 16.

22 ¹⁹ *Id.*

23 ²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 5–6, ¶ 17.

²³ *Id.* at 6, ¶ 18.

lay on the ground.²⁴ But the attack didn't stop with Karsky and Stubbs. Soon, Rivera joined in and "punched [Reed] several times."²⁵ Reed later learned from other inmates that as the attack continued, Grant stood and watched from outside the office.²⁶ When Grant finally entered with Dicus to help hold Reed down, Dicus put his knees on Reed's head as Reed lay there bleeding.²⁷ Based on his version of events, Reed maintains that the document prepared by Moreda was inaccurate, leading Brown to wrongly find him guilty of battery.²⁸

II. Procedural history

Reed initiated this lawsuit against the officers and other Nevada officials, which has whittled down to just four claims against the officers: First Amendment retaliation and Eighth Amendment excessive-force claims against Karsky, Stubbs, Rivera, and Dicus; an Eighth Amendment failure-to-protect claim against Corral-Lagarda and Grant; and a Fourteenth Amendment due-process claim against Moreda and Brown. Stubbs, Rivera, Dicus, Grant, Moreda, and Brown move for summary judgment, arguing that Reed cannot produce evidence to support his claims and that qualified immunity shields them from liability. The magistrate judge construed Reed's first response to the summary-judgment motion as a request for more time to file his response and granted it after finding good cause.²⁹ Reed now offers his declaration and

²⁴ *Id.*

²⁵ *Id.* at 6, ¶ 19.

²⁶ *Id.* at 6, ¶ 18.

²⁷ *Id.* at 6, ¶ 19.

²⁸ *Id.* at 7, ¶ 21.

²⁹ ECF No. 94 at 3–4. The officers did not object to this order and have thus waived an objection to Reed's later-filed response. *See* L.R. IB 3-1(a) ("Any party wishing to object to the magistrate judge's order on a pretrial matter must file and serve specific written objections . . . [within] 14 days after service of the order.").

1 declarations from other inmates who observed the attack from their cells.³⁰ And he objects to the
2 magistrate judge’s most recent order denying his motions for sanctions.³¹

3 4 Discussion

5 **I. Reed must show cause why his claims against Corral-Lagarda and Karsky should** 6 **not be dismissed.**

7 Generally “an incarcerated pro se plaintiff proceeding in forma pauperis is entitled to rely
8 on the U.S. Marshal for service of the summons and complaint.”³² But that assistance is not
9 unlimited and comes with an obligation for the plaintiff: to provide the U.S. Marshal the
10 information needed to help serve a defendant.³³ Though Reed initiated this case more than two
11 years ago, Corral-Lagarda and Karsky—who no longer work for the Nevada Department of
12 Corrections—have not been served with process.

13 Recognizing Reed’s pauper status, Magistrate Judge Brenda Weksler gave him an
14 additional 60 days to serve the two officers and provided him with the required USM-285 forms
15 last year.³⁴ But when the addresses Reed had yielded unsuccessful results, the magistrate judge
16 ordered Reed to give the court the information necessary for the U.S. Marshal to serve these
17 defendants.³⁵ In that order, Magistrate Judge Weksler noted that though the U.S. Marshal must
18 assist Reed in his service efforts, he’s still required to give the court the necessary information

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20 ³⁰ See ECF No. 92 (response).

21 ³¹ ECF No. 115.

22 ³² *Puett v. Blandford*, 912 F.2d 270, 275 (9th Cir. 1990).

23 ³³ See *id.* (requiring the plaintiff to “provide[] the necessary information to help effectuate service”).

³⁴ ECF No. 31 at 2.

³⁵ ECF No. 49 at 2–3.

1 for the U.S. Marshal to do so.³⁶ Though Reed objected to that order,³⁷ he provided updated
 2 information for Karsky only.³⁸ When service was unsuccessful yet again, Reed sought a
 3 subpoena for Karsky's information directed at the Nye County Sherriff's Office, where he
 4 believed Karsky most recently worked.³⁹ That motion was granted, but its results were
 5 ultimately fruitless—after three tries, the subpoena was returned unexecuted.⁴⁰

6 As Reed's filings and the record make clear, he's aware of the tools available to him to
 7 serve these defendants—he filed a subpoena and the court informed him that he could “later seek
 8 to serve Karsky by publication.”⁴¹ Though Reed has not succeeded in his efforts, the record
 9 reflects that Reed has not made any attempt to obtain Karsky's information or use the
 10 appropriate resources to do so since March. And more troubling, he appears to have all but
 11 given up on locating Corral-Lagarda. After the magistrate judge ordered him to provide
 12 information for both defendants, he's been silent about his service attempts on Corral-Lagarda.
 13 So I order Reed to show cause in writing why the claims against these defendants should not be
 14 dismissed under Federal Rule of Civil Procedure 4(m) for failure to timely serve them.

15 **II. The defendants' motion for summary judgment [ECF No. 63]**

16 The appearing defendants offer several routes to resolve the claims in this dispute. I
 17 begin with Reed's claims against Grant, Brown, and Moreda and I grant summary judgment on
 18 those claims. I then address qualified immunity and find that the underlying factual dispute
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20 ³⁶ *Id.* at 2.

21 ³⁷ ECF No. 49 (objection); ECF No. 112 (order overruling objection).

22 ³⁸ ECF No. 51.

23 ³⁹ ECF No. 55.

⁴⁰ ECF No. 96.

⁴¹ ECF No. 71 at 4.

precludes resolution of Reed’s claims based on qualified immunity at this stage. Next, I turn to whether Reed’s excessive-force claim is barred by *Heck v. Humphrey*. Finding that neither qualified immunity nor *Heck* bar Reed’s claims from proceeding to trial, I turn to the substantive challenges to his claims.

A. Legal standard

Summary judgment is appropriate when the pleadings and admissible evidence “show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.”⁴² On summary judgment, the court must view all facts and draw all inferences in the light most favorable to the nonmoving party.⁴³ An inference need not be “necessarily the most likely inference or the most persuasive,” as long as it is “rational or reasonable.”⁴⁴ “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from facts are jury functions, not those of a judge.”⁴⁵ The purpose of summary judgment is to avoid unnecessary trials when the facts are undisputed, so summary judgment is inappropriate when reasonable minds could differ on material facts.⁴⁶

B. Reed has not shown that Grant was present to protect him.

The Eighth Amendment protects an inmate from cruel and unusual punishment.⁴⁷ Part of that protection is a requirement that prison officials “take reasonable measures to guarantee the

⁴² *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (citing Fed. R. Civ. P. 56(c)).

⁴³ *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).

⁴⁴ *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir. 1989) (quoting *T.W. Elec. Serv. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987)).

⁴⁵ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

⁴⁶ *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995).

⁴⁷ *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (quoting *Ingraham v. Wright*, 430 U.S. 651, 670 (1977)).

1 safety of inmates.”⁴⁸ That includes the notion that a prison official will intervene to prevent
 2 other officers from inflicting cruel and unusual punishment.⁴⁹ To violate this guarantee, a prison
 3 official must forego his ability to intervene and act with “‘deliberate indifference’ to inmate
 4 health or safety.”⁵⁰

5 The defendants argue that Grant cannot be held liable for failing to intervene because he
 6 wasn’t there when the altercation occurred, he merely showed up after Reed was already
 7 restrained.⁵¹ Reed responds in his declaration that he “was told by” various inmates, some of
 8 whom submitted declarations in support of this dispute, that Grant “was outside the office and
 9 did nothing to stop the attack.”⁵² Rule 56 permits a party to oppose a summary-judgment motion
 10 using a declaration, but that declaration “must be made on personal knowledge” and must
 11 contain “facts that would be admissible in evidence.”⁵³ Even viewing Reed’s declaration in the
 12 light most favorable to him, he has failed to demonstrate any evidence to support his failure-to-
 13 protect claim against Grant. As Reed’s declaration makes clear, his claim rests solely on Varrice
 14 Williams’s, John Bonner’s, and Travis Taylor’s claimed observation of Grant during the
 15 incident, not his personal knowledge.⁵⁴ Neither Williams’s, Bonner’s, nor Taylor’s declarations
 16 mention Grant and I cannot reasonably infer from Reed’s declaration that he has personal

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 18 ⁴⁸ *Hudson v. Palmer*, 468 U.S. 517, 526–27 (1984).

19 ⁴⁹ *Robins v. Meecham*, 60 F.3d 1436, 1442 (9th Cir. 1995) (citations omitted).

20 ⁵⁰ *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citation omitted).

21 ⁵¹ ECF No. 63 at 11.

22 ⁵² ECF No. 92 at 6, ¶ 18.

23 ⁵³ Fed. R. Civ. P. 56(c)(4).

⁵⁴ *Cf. Cortez v. Skol*, 776 F.3d 1046, 1052 n.6 (9th Cir. 2015) (finding that an inmate presented sufficient evidence to withstand summary judgment, despite relying on the repetition of another’s statement because “Plaintiff does not need to rely on the [third party’s] account because [he] acknowledged the truth of the statement in his later declaration”).

1 knowledge to testify about Grant’s role in the melee.⁵⁵ At best, his statements about what the
 2 other inmates told him are inadmissible hearsay.⁵⁶ Because Reed has not met his burden on this
 3 claim, I grant summary judgment in Grant’s favor and terminate him from this case as no claims
 4 remain against him.

5
 6 **C. Reed has not demonstrated that his disciplinary hearing violated his due-
 process rights.**

7 The Supreme Court outlined the procedural requirements necessary to ensure due process
 8 “before a prison inmate can be deprived of a protected liberty interest in good[-]time credits”⁵⁷ in
 9 *Wolff v. McDonnell*.⁵⁸ If a disciplinary hearing could “result in the loss of good[-]time credits,”
 10 an “inmate must receive: (1) advance written notice of the disciplinary charges; (2) an
 11 opportunity . . . to call witnesses and present” “evidence in his defense; and (3) a written
 12 statement by the factfinder of the evidence relied on and the reasons for the disciplinary
 13 action.”⁵⁹ A disciplinary hearing satisfies due process so long as “some evidence supports the
 14 decision by the prison disciplinary board to revoke good[-]time credits.”⁶⁰ This isn’t a high bar
 15 and “the relevant question is whether there is *any* evidence in the record that could support the
 16 conclusion reached by the disciplinary board.”⁶¹

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 18
 19 _____
⁵⁵ Cf. *Barthelemy v. Air Lines Pilots Ass’n*, 897 F.2d 999, 1018 (9th Cir. 1990) (citation omitted).

20 ⁵⁶ See *Cortez*, 776 F.3d at 1052 n.6; Fed. R. Evid. 801(c).

21 ⁵⁷ *Superintendent, Massachusetts Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 453 (1985).

22 ⁵⁸ *Wolff v. McDonnell*, 418 U.S. 539, 563–70 (1974).

23 ⁵⁹ *Hill*, 472 U.S. at 454.

⁶⁰ *Id.* at 455.

⁶¹ *Id.* (emphasis added).

1 The defendants argue that ample evidence supported their disciplinary decisions because
2 they relied on Karsky's, Stubbs's, and Corral-Lagarda's reports about the incident. Reed
3 contends that no evidence supported the defendants' disciplinary decision because their reports
4 were false. Although an allegation of a false discipline report changes the some-evidence
5 standard, it does so only if "a prisoner alleges [that] a correctional officer has falsely accused
6 him of violating a prison rule in retaliation for the prisoner's exercise of his constitutional
7 rights."⁶² Reed's due-process claim at its core does not center on Moreda and Brown falsely
8 accusing him of battery in retaliation for an exercise of his rights. As the record makes clear,
9 Reed was given notice of the charges well in advance of the hearing. At that hearing, Reed
10 testified to his version of events and declined the invitation to present his own witnesses.⁶³
11 Brown weighed Reed's version against the reports and concluded that the officers' version was
12 more credible. Even viewing this evidence in the light most favorable to Reed, I cannot
13 conclude that a reasonable juror could find that no evidence supported Brown's decision—even
14 if Reed believes that it's based on fiction. So I grant summary judgment for Moreda and Brown
15 and against Reed on his due-process claim.⁶⁴ And because there are no outstanding claims
16 against those defendants, I terminate them from this case.

21 ⁶² *Hines v. Gomez*, 108 F.3d 265, 269 (9th Cir. 1997).

22 ⁶³ ECF No. 64 at 21.

23 ⁶⁴ Because I grant summary judgment on this basis, I need not and do not consider whether Reed exhausted this claim under the Prison Litigation Reform Act or whether the defendants are entitled to qualified immunity on this claim.

D. Reed’s excessive-force claim presents triable issues.

1. Genuine factual disputes preclude summary judgment on qualified immunity.

Qualified immunity shields government officials “from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was ‘clearly established’ at the time of the challenged conduct.”⁶⁵ The Ninth Circuit has explained that “‘whether a constitutional right was violated . . . is a question of fact’ for the jury, while ‘whether the right was clearly established . . . is a question of law’ for the judge.”⁶⁶ To show that conduct violated a clearly established law, the plaintiff must prove that, at the time of the alleged misconduct, “the contours of [the] right [were] sufficiently clear that every reasonable official would have understood that what he is doing violates that right.”⁶⁷ But “when there are disputed factual issues that are necessary to a qualified immunity decision, these issues must first be determined by the jury before the court can rule on qualified immunity.”⁶⁸

All defendants contend that qualified immunity shields them from Reed’s claims. But the polar-opposite versions of the fight make it impossible for me to resolve the immunity question on summary judgment.⁶⁹ In the defendants’ version, Reed instigated the fight and Stubbs and Karsky merely deescalated the situation before Dicus and Grant, who were not there, came to

⁶⁵ *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011).

⁶⁶ *Morales v. Fry*, 873 F.3d 817, 823 (9th Cir. 2017) (alteration in original).

⁶⁷ *Ashcroft*, 563 U.S. at 741 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (quotation and brackets omitted); see *Robinson v. York*, 566 F.3d 817, 826 (9th Cir. 2009).

⁶⁸ *S.R. Nehad v. Browder*, 929 F.3d 1125, 1140 (9th Cir. 2019), *cert. denied sub nom. Browder v. Nehad*, 141 S. Ct. 235 (2020) (quoting *Morales*, 873 F.3d at 824).

⁶⁹ *Ting v. United States*, 927 F.2d 1504, 1510 (9th Cir. 1991) (“The issue of whether [an officer] is entitled to qualified immunity also cannot be resolved as a matter of law in light of the factual conflict surrounding the circumstances of the shooting.”).

1 help restrain Reed, and Rivera merely recorded the events. But Reed offers a series of
 2 declarations that show the opposite: he was complying with the officers' orders when Karsky,
 3 Stubbs, and Rivera needlessly beat him, and Dicus kneeled on his head. Which story the jury
 4 will believe is the linchpin of the qualified-immunity issue. Under Reed's version, the
 5 defendants likely wouldn't be entitled to qualified immunity on Reed's excessive-force claim:
 6 Rivera punched him repeatedly as three officers held him down and beat him, Dicus kneeled on
 7 Reed's head while he was already compliant and as he bled profusely, and Stubbs participated in
 8 pummeling Reed as he "lay barely conscious" on the ground. If the officers' story is credited
 9 however, it likely wasn't clearly established that using force to restrain a combative Reed is a
 10 violated the Eighth Amendment. Although several aspects of Reed's story are belied by the
 11 evidence in the record, and a jury may find it hard to believe, credibility determinations cannot
 12 be made on summary judgment.⁷⁰ So these genuine issues of material fact preclude summary
 13 judgment on all the defendants' qualified-immunity claims.

14 **2. *Triable issues of fact exist about whether the force was excessive.***

15 The parties' divergent versions of events also leave genuine issues of fact about whether
 16 the force used here was excessive. The Ninth Circuit has cautioned against granting summary
 17 judgment on excessive-force claims because the essential "balancing nearly always requires a
 18 jury to sift through disputed factual contentions, and to draw inferences therefrom"⁷¹ While
 19 courts may consider a variety of factors to determine whether force was excessive,⁷² when
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21 ⁷⁰ *Anderson*, 477 U.S. at 255.

22 ⁷¹ *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1056 (9th Cir. 2003); *Liston*
v. Cnty. of Riverside, 120 F.3d 965, 976 n.10 (9th Cir. 1997), *as amended* (Oct. 9, 1997).

23 ⁷² *Bearchild v. Cobban*, 947 F.3d 1130, 1140 (9th Cir. 2020) (citing *Hudson v. McMillian*, 503
 U.S. 1, 6 (1992)).

1 “material questions exist regarding the circumstances of the [incident]” the court need not
2 consider whether conduct is objectively reasonable.⁷³ Reed has produced evidence from which a
3 reasonable jury could find that he was beaten by multiple guards while he was defenseless, a
4 story that is vastly at odds with that of the officers. Assessing credibility at this point is simply
5 not a job for the court. So I deny the defendants’ motion for summary judgment on Reed’s
6 excessive-force claim.

7 **3. *Reed’s excessive-force claim is not Heck-barred.***

8 The defendants also argue that Reed’s success on his excessive-force claim against
9 Karsky would imply that his disciplinary sanction that resulted in a loss of good-time credits was
10 invalid. So they urge me to find that his excessive-force claim is barred by the U.S. Supreme
11 Court’s decision in *Heck v. Humphrey*.⁷⁴ I decline their invitation to do so. To determine
12 whether a claim is *Heck*-barred, “an important touchstone is whether a § 1983 plaintiff could
13 prevail only by negating ‘an element of the offense of which he has been convicted.’”⁷⁵ Under
14 the administrative regulation that Reed was disciplined, battery requires proof of “any willful use
15 of force or violence upon the person of another.”⁷⁶ But to succeed under a theory of excessive
16 force under the Eighth Amendment, Reed must show that Karsky maliciously and sadistically
17 applied force to cause harm and not “in a good-faith effort to maintain or restore discipline.”⁷⁷
18 The defendants have not shown that Reed’s success on this claim is contingent on him

20 ⁷³ See *Ting v. United States*, 927 F.2d 1504, 1510 (9th Cir. 1991).

21 ⁷⁴ ECF No. 63 at 12 (citing *Heck v. Humphrey*, 512 U.S. 477, 487 (1994)).

22 ⁷⁵ *Cunningham v. Gates*, 312 F.3d 1148, 1153–54 (9th Cir. 2002) (quoting *Heck*, 512 U.S. at 487).

23 ⁷⁶ ECF No. 64 at 34.

⁷⁷ *Hudson*, 503 U.S. at 7.

1 demonstrating that he never touched Karsky.⁷⁸ Even if the defendants could demonstrate that
 2 *Heck* applies to Reed’s excessive-force claim, it would at best preclude his recovery under this
 3 claim against Karsky only because Reed’s sanction was for elbowing him, not for threatening to
 4 hit the other officers.⁷⁹ Karsky has not been served, and the Nevada Attorney General’s office
 5 does not represent him, so I cannot enter summary judgment in his favor.

6 **E. Reed’s retaliation claim proceeds against Stubbs only.**

7 Having narrowed Reed’s excessive-force claim to just Stubbs, Rivera, and Dicus, I turn
 8 to Reed’s retaliation claim. In the prison context, a plaintiff must prove five elements to
 9 establish a First Amendment retaliation claim: “(1) An assertion that a state actor took some
 10 adverse action against an inmate (2) because of (3) that prisoner’s protected conduct, and that
 11 such action (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action did
 12 not reasonably advance a legitimate correctional goal.”⁸⁰

13 Stubbs argues that his use of force furthered the government interest of quelling Reed
 14 when he elbowed Karsky. But as I explained *supra*, Reed has presented evidence from which a
 15 jury could infer that Stubbs initiated his gang investigation and ultimately beat Reed because he
 16 knew that Reed had filed a grievance against Stubbs’s peer. As the Ninth Circuit held in
 17 *Brodheim v. Cry*, on summary judgment, a plaintiff “need only ‘put forth evidence of retaliatory
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 19

20 ⁷⁸ While Reed’s theory is that he never touched Karsky, he might still succeed on his excessive-
 21 force claim if he proves that, despite touching Karsky, the officer applied more force than
 reasonably necessary to further his efforts at maintaining peace.

22 ⁷⁹ ECF No. 64 at 20–26, 34 (AR 707 defining battery as “any willful use of force or violence
 upon the person of another”); *see Hill v. Moore*, 19 F. App’x 564, 565 (9th Cir. 2001)
 (unpublished) (vacating a district court’s decision to dismiss an excessive-force action against all
 23 defendants when the plaintiff was convicted of battery as to only one defendant).

⁸⁰ *Rhodes v. Robinson*, 408 F.3d 559, 567–68 (9th Cir. 2005).

1 motive, that taken in the light most favorable to him, presents a genuine issue of material fact as
2 to [the defendant's] intent.”⁸¹ I find that Reed has met this burden.

3 Stubbs's reliance on a video of Reed after the incident does not change this result. That
4 video, which captures the moments after the fight, shows Reed laying on the ground, bleeding
5 from his head, repeatedly saying that the officers beat him “for no reason.”⁸² As a nurse tends to
6 Reed's wounds, the nurse asks Reed what happened, and Reed repeats that the officers attacked
7 him without cause.⁸³ According to the defendants, Reed's answer to the nurse's question
8 forecloses the possibility that they attacked him in retaliation, simply because he does not
9 mention it. But Reed didn't need to state in that moment that they had retaliated against him to
10 survive summary judgment—his declaration establishes that the officers found his grievance
11 during the search of his cell. While the video may reduce the likelihood that Dicus was kneeling
12 on him and that Rivera was there in time to punch Reed before he began recording the aftermath,
13 it certainly doesn't put any issue beyond dispute, and Reed will likely offer this video to
14 demonstrate that he was complying with their requests and to show his injuries.

15 But while I find that there are genuinely disputed facts that preclude summary judgment
16 on this retaliation claim against Stubbs, I find that the record does not demonstrate that Dicus or
17 Rivera ever knew about Reed's grievance, leaving Reed unable to demonstrate that they acted
18 with any retaliatory motive. Though a plaintiff at the summary-judgment stage may rely on
19 timing “as circumstantial evidence of retaliatory intent,”⁸⁴ the parties agree that Dicus and Rivera
20

21 ⁸¹ *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir. 2009) (quoting *Bruce v. Ylst*, 351 F.3d 1283,
22 1289 (9th Cir. 2003)).

23 ⁸² *See, e.g.*, ECF No. 68-1 at 00:30, 00:46.

⁸³ *Id.* at 02:37–40.

⁸⁴ *Brodheim*, 584 F.3d at 1271.

1 were not present for the initial interview, the search of Reed's cell, or the beginning of the fight.
2 As one inmate declares, Rivera responded to the office "several minutes after the attack."⁸⁵
3 Though it's unclear why Rivera and Dicus responded in the way that Reed claims, Reed has not
4 presented any evidence from which I could infer that they retaliated against him. So I grant
5 summary judgment in their favor on this claim, which now proceeds against Stubbs only.

6 **III. Reed's objection to the magistrate judge's order is meritless [ECF No. 115].**

7 Litigation of this case has been nothing short of contentious: the parties have deployed
8 several sanctions motions at one another, and Reed has objected to several of the magistrate
9 judge's orders, accusing her of impropriety. He reiterates that concern and objects to the
10 magistrate judge's most recent order denying the parties' motions for sanctions, arguing that she
11 "turned a blind eye[] to opposing counsel's misconduct" and "collude[d] with" them.⁸⁶ Reed
12 does not identify any error in the magistrate judge's ruling. Instead, he uses his objection as
13 another opportunity to argue that the magistrate judge is biased.

14 Reed's allegations are unsupported by anything other than his subjective belief that she's
15 acted partially because she's issued rulings against Reed. And as I noted in my last order
16 overruling Reed's objections and denying his requests for injunctive relief, Reed's suspicions of
17 bias alone are insufficient to merit recusal. As the Supreme Court explained in *Liteky v. United*
18 *States*, "judicial rulings alone almost never constitute a basis for a bias or partiality motion."⁸⁷

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22 ⁸⁵ ECF No. 92 at 34, ¶ 3.

23 ⁸⁶ ECF No. 115 at 1–2.

⁸⁷ *Liteky v. United States*, 510 U.S. 540, 555 (1994) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966)).

1 Because I am not left with “a definite and firm conviction” that the magistrate judge misapplied
 2 the law⁸⁸ or made a mistake of fact,⁸⁹ I overrule Reed’s objection.

3 **Conclusion**

4 IT IS THEREFORE ORDERED that the defendants’ motion for summary judgment
 5 **[ECF No. 63] is GRANTED in part. This case proceeds on:**

- 6 • Reed’s First Amendment retaliation claim against Stubbs and Karsky only, and
- 7 • Reed’s Eighth Amendment excessive-force claim against Stubbs, Karsky, Rivera, and
- 8 Dicus.

9 IT IS FURTHER ORDERED that summary judgment is GRANTED

- 10 • In favor of Grant on Reed’s failure-to-protect claim
- 11 • In favor of Moreda and Brown on Reed’s due-process claim, and
- 12 • In favor of Rivera and Dicus on Reed’s retaliation claim.

13 I further direct the Clerk of Court to TERMINATE Grant, Moreda, and Brown as
 14 defendants in this matter as no claims remain against them.

15 IT IS FURTHER ORDERED that Reed must **SHOW CAUSE by September 27, 2021**,
 16 why his claims against Karsky and Corral-Lagarda should not be dismissed for failure to timely
 17 serve them. If Reed fails to do so, his claims against Karsky and Corral-Lagarda will be
 18 dismissed under FRCP 4(m).

22 ⁸⁸ See *Grimes v. City & Cnty. of San Francisco*, 951 F.2d 236, 240–41 (9th Cir. 1991).


23 ⁸⁹ *Concrete Pipe and Prods. of California, Inc. v. Constr. Laborers Pension Tr. for S. California*,
 508 U.S. 602, 623 (1993).

1 IT IS FURTHER ORDERED that the defendants' unopposed motion for leave to file
2 Reed's medical records under seal [ECF No. 65] is **GRANTED**. The Clerk of Court is directed
3 to **maintain the seal on ECF No. 66**.

4 IT IS FURTHER ORDERED that Reed's objection to the magistrate judge's order [ECF
5 No. 115] is **OVERRULED**.

6 IT IS FURTHER ORDERED that **this case is referred to the Pro Bono Program**
7 adopted in General Order 2016-02 for the purpose of screening for financial eligibility (if
8 necessary) and identifying counsel willing to be appointed as counsel for Plaintiff David Reed at
9 no expense to him. The scope of appointment will be for all purposes through conclusion of
10 trial. By referring this case to the Pro Bono Program, I am not expressing an opinion on the
11 merits of the case. The **Clerk of Court** is directed to forward this **order to the Pro Bono**
12 **Liaison**.

13 IT IS FURTHER ORDERED that this case is **REFERRED to the magistrate judge for**
14 **a mandatory settlement conference**. The parties' obligation to file their joint pretrial order is
15 **STAYED** until 10 days after that settlement conference.

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17 
U.S. District Judge Jennifer A. Dorsey
August 27, 2021
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